

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 590 OF 1980

SRIRAM GANGARAM GUPTA alias)
Shriram Gangaram Jaiswal of)
Bombay, Indian Inhabitant residing)
at Arun Niwas, Room No.11, S.V.)
Road, Borivli (West), Bombay-92.)..Plaintiff

Versus

1. M/S. VEEKAY BUILDERS ASSOCIATES,)
a partnership firm carrying on)
business of Builders having)
their office at 26, Bazar Gate,)
Sangli Bank Building, Fort,)
Bombay-1.)
2. KANUBHAI HARIBHAI SUCHAK of)
of Bombay Indian Inhabitant,a)
partner of Defendant No.1 firm)
having his office at Sangli)
Bank Building, Fort, Bombay-1.)

3. VIJAYBHAI VELJIBHAI THAKKAR)
 of Bombay, Indian Inhabitant, a)
 partner in the defendant No.1)
 firm having his office at Sangli)
 Bank Building, Fort, Bombay-1.)
4. GORDHANDAS V. PATIL, of Bombay)
 Indian Inhabitant carrying on)
 business at Shop No.21, Ground)
 - Floor Sahyadri Apartments,)
 Lokmanaya Tilak Road,)
 Borivli West, Bombay.)..Defendants

Mr. J.G.Damani for the Plaintiff.

Mr. Snehal Shah & M.S.Rane i/b. M/s. Purnanand & Co.
 for Defednants Nos. 1 to 3.

Mr. PrakashHegde for Defendant No.4.

CORAM: S.K.SHAH, J.

JUDGMENT RESERVED ON: 15TH APRIL, 2005

JUDGMENT PRONOUNCED ON: 20th APRIL, 2005.

ORAL JUDGMENT:

1. The Plaintiff has filed the suit for a declaration that there is a valid and concluded agreement with Defendants Nos. 1 to 3 for sale on

ownership basis of Shop No.21, for specific performance of the said agreement of sale and in the alternative for refund of the consideration paid with damages.

2. The suit shop is shop No.21 on the ground floor of the building called "Sahyadari Apartments and Shopping Centre", situate at Lokmanya Tilak Road, Borivli (West), Mumbai.

3. The Defendants Nos. 1 to 3 are builders. The Defendants Nos. 2 and 3 are partners of the Defendant No.1 firm. In 1972, the Defendant No.1 started construction of the aforesaid building which consisted of ground and four upper floors. On the ground floor, they were to construct about 25 shop premises and on the upper four floors, they were to be residential flats. The Plaintiff is already running a flour mill in other locality. Having learnt about the construction of shopping centre undertaken by the Defendants, the Plaintiff approached the Defendants Nos. 2 and 3 and expressed his willingness to purchase one of the shop premises for the specific purpose of establishing a flour mill. Earlier the agreement was with regard to the shop No.10, but later on it was with regard to either of the three shop premises No.10 or No.21 or No.22 and later on it was

agreed with regard to shop No.21. Although there is dispute with regard to the nature of agreement, it is not disputed that the Plaintiff had approached the Defendants Nos. 2 and 3 with an intention to have the shop for the purpose of establishing the flour mill. There is also no dispute as to the fact that the Plaintiff paid to the Defendants Rs.8,000/- by cheque in November, 1974 and Rs.10,000/- again by cheque in March, 1974.

4. The Plaintiff alleged that the agreement which he entered into with the Defendants orally was with regard to the purchase of shop premises. The agreed consideration was Rs.18,000/-. He had paid to the Defendants entire consideration of Rs.18,000/-. He further alleged that it was further agreed that which of the shop premises as indicated in the pamphlet, Exhibit "A" would be given to the Plaintiff would be decided only after getting approval from the Municipal corporation of Greater Bombay (for short, "B.M.C."). After having this oral agreement, the Defendants Nos. 2 and 3 asked him to pay for confirming the agreement. Accordingly, he paid Rs.8,000/-. He further alleged that later on as demanded by the Defendants, he also paid the remaining part of the consideration of Rs.10,000/- by cheque in March 1974. He further alleged that possession of shop No.21 was also given

to him at the time when he paid the entire consideration. In the meantime, he continued to make application to the B.M.C. for permission for establishing a flour mill. He alleged that the Defendants had given him a letter dated 20.11.1975 addressed to the B.M.C. seeking permission to establish a flour mill. That letter was given to him by the Defendants. By his forwarding letter dated 6.12.1975, the Plaintiff forwarded the said letter dated 20.11.1975 to the B.M.C. seeking permission for establishment of the flour mill. By letter dated 5.4.1979, the B.M.C. required him to produce the written agreement for purchase of shop premises and intimated that thereupon they would scrutinise his application for the purpose of establishment of the flour mill. In the meantime, however, in November, 1978, he found some Pooja was being performed in the shop No.21 by some strangers. He alleged that the lock which he had put to the shop No.21 was broken open and removed and the articles belonging to him which were lying in the shop were missing. He, therefore, filed an application under Section 145 of the Criminal Procedure Code to the Metropolitan Magistrate at Borivli, Mumbai, seeking orders protecting his possession of shop No.21. He however, did not pursue that Application as then filed the present suit seeking aforesaid reliefs including as

against Defendant no.4 alleging that he was not a bonafide purchaser for value.

5. The Defendant No.1 resisted the suit by the Written Statement dated 9.9.1999 while admitting to have received the total amount of Rs.18,000/- from the Plaintiff. They contended that the agreement with the Plaintiff was not for sale of shop premises, but it was only to give a flour mill to the Plaintiff on conducting basis. The amount of Rs.8,000/- which was accepted from the Plaintiff was only by way of deposit and for confirmation of the conducting agreement. The letter dated 20.11.1975 was given to the Plaintiff only for the purpose of pursuing the matter of getting permission for establishment of the flour mill and not to make an application therefor in his favour. It is contended that initially only Rs.8,000/- were deposited and later on the Plaintiff voluntarily deposited Rs.10,000/- without interest, in order to get preference in getting right to conduct the flour mill. It is further contended that when the Defendants could not succeed in getting flour mill, they accordingly informed the Plaintiff to take away the deposit of Rs.18,000/-. However, the Plaintiff insisted on retaining the same with them. The Defendants further contended that they continued to make enquiries with the B.M.C. and ultimately they

were informed by the B.M.C. Authorities that they could not get permission for the flour mill and, therefore, the same was informed to the Plaintiff when the Plaintiff had come to the site. The Plaintiff however, said that he would make his own enquiries and try to get the permission. However, he also could not get the same. They contended that they had kept shop Nos.10, 21 and 22 vacant in the hope that they would get permission for establishment of flour mill in either of these shops. However, when they learnt for sure that they were not getting permission, they started selling those shops and shop No.21 was sold to Defendant No.4. On this contention, they claimed dismissal of the Plaintiff's suit.

6. The Defendant no.4 resisted the suit on the ground that he is a bonafide purchaser of the suit shop for value and without notice of the suit agreement with the Plaintiff. Therefore, he also claimed dismissal of the suit.

7. In view of these pleadings, the following issues are framed against which I have recorded my findings for reasons given below :-

ISSUES	FINDINGS
1. Whether Plaintiff proves	Affirmative

- that Suit as filed is not barred by the Law of Limitation?
2. Whether Plaintiff proves that Suit is maintainable in this Hon'ble Court due to pecuniary jurisdiction ? Affirmative
 3. Whether Plaintiff proves that there is Agreement for Sale of Shop No.21 on the ground floor of the building known as Sahayadri Apartment and Shopping Centre at Lokmanya Tilak Road, Borivali (West) ? Affirmative
 4. If issue No.3 is in affirmative is the said Agreement binding and enforceable against Defendants Nos. 1 to 3 ? Negative
 5. Whether Plaintiff proves that pursuant to the said Agreement the Plaintiff has paid a sum of Rs.18,000/- ? Affirmative
 6. Whether Plaintiff proves that the sum of Rs.18,000/- was the full and final consideration agreed upon by the Defendants and for what area of shop ? Affirmative
 7. Whether Plaintiff proves that by virtue of the said Agreement and payment he is entitled to the possession of the said shop on ownership basis ? Negative
 8. Whether Plaintiff proves that he was put into the possession of shop No.21 as alleged ? Negative
 9. If issue No.7 is in affirmative, whether Plaintiff proves that Plaintiff was forcibly dispossessed ? Negative
 10. Whether Plaintiff proves that Plaintiff had bought the Articles stated in para 13 and kept in shop No. 21 ? Negative
 11. Whether Plaintiff proves that he has suffered a loss and Negative

therefore entitled for damages of Rs.25,000/- as stated in para 24 ?

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|-----|--|---------------|
| 12. | Whether Defendant No.4 proves that he is bonafide purchaser without Notice and for consideration in respect of suit premises ? | Negative |
| 13. | Whether Plaintiff is entitled for any relief ? | As per order. |

Issue No.1 :

8. It is contended on behalf of the Defendants that the agreement was entered into somewhere in 1973 and payments of Rs.8,000/- and Rs.10,000/- were also made in 1973 and 1974. It is also further contended that the Plaintiff has claimed refund of money by way of alternative relief claiming interest from 20.11.73 on Rs.8,000/- and from 20.3.1974 on Rs.10,000/-. Therefore, the contention is that the suit should have been filed within three years from these dates. However, the suit was filed somewhere in 1979 initially in the City Civil Court which came to be transferred to this Court and was numbered as above. However, the contention raised on behalf of the Defendants is not acceptable. The cause of action for the suit as disclosed in the plaint arose in November, 1978 when the Plaintiff allegedly found that the suit shop was occupied by some third person. From the evidence, it

is also apparent that the Plaintiff was trying to get permission from the B.M.C. for establishment of a flour mill and the said attempt continued to the knowledge of the Defendants till November, 1978 when the Plaintiff found some third person occupying the suit premises which could be said to be in breach of the agreement. Therefore, the suit is within limitation. This issue therefore shall have to be answered in the affirmative.

Issue No.2:

9. The learned Counsel for the Defendants fairly conceded that this Court has jurisdiction to try the suit as the valuation is more than Rs.50,000/-. The suit is valued for the purpose of Court fees and jurisdiction at Rs.55,000/- and therefore, this Court has jurisdiction. This issue is, therefore, also answered in the affirmative.

Issue Nos.3, 5 & 6 :

10. The Plaintiff has examined himself. The Defendant no.2 has also examined himself. Defendant No.3 has examined himself. The defendant No.4 has examined himself.

11. There is no dispute that the Plaintiff had approached the defendants on the basis of the pamphlet, Exhibit "A", with a view to purchase the shop premises for the purpose of establishment of flour mill. That was somewhere in 1972. He met Defendants Nos. 2 and 3 and categorically informed them his intention to purchase a shop premises for the purpose of establishing flour mill. The Plaintiff already had his own flour mill at Borivali itself, but in different locality. He states that Defendants told him that in all three shops were available for the said purpose for being allotted on ownership basis. He further states that Defendant No.2 specifically told him that which of the three shop premises would be given to the Plaintiff would be decided only after getting permission from the B.M.C. for establishment of flour mill. He states that Defendants Nos. 2 and 3 asked him to make payment of one shop so as to confirm the transaction. The total consideration agreed was Rs.18,000/- with the other expenses, if any, including stamp duty and registration charges. He also states that the Defendants Nos. 2 and 3 assured him that they will not deal with these three shop premises, viz. shop Nos. 10, 21 and 22 till the Plaintiff get sanction from the B.M.C. to start a flour mill in any of these shops. Pursuant to the said agreement, he made payment of Rs.8,000/- by cheque dated 10.11.1973. He further

states that in March, 1974, the Defendants Nos. 2 and 3 further demanded balance amount of Rs.10,000/- specifying that it would be in respect of shop No.21, but assured that if the permission was given by the B.M.C. for shop No.10, then they will give him same shop. Trusting the Defendants, he made payment of the balance consideration of Rs.10,000/- by cheque dated 20.3.1974.

12. That with regard to this agreement, the Defendant No.3 - Vijay Velji Thakkar states that initially the Plaintiff had approached them for purchase of shop for running a flour mill. He however states that the permission for establishment of flour mill could not be obtained and, therefore, they informed the Plaintiff. The Plaintiff further told them that he did not want to purchase any shop without flour mill sanction. The Defendants however informed the Plaintiff that the value of the shop with permission for flour mill user would fetch very high price. Therefore, the Plaintiff showed williness to conduct the flour mill on behalf of the Defendants if they wish to run the flour mill themselves. He therefore made enquiries with the architect about possibility of establishing a flour mill and thereafter informed the Plaintiff that the Defendants would consider the Plaintiff's offer for conducting the flour

mill if the B.M.C. gave permission to the Defendant no.1 for establishment of a flour mill. he further states that the Plaintiff again approached the Defendants and repeated his willingness to take flour mill on conducting basis. Agreeing with the proposal given by the Plaintiff, they required the Plaintiff to make payment of Rs.8,000/- as interest free deposit without any commitment on their part and only for confirming the Plaintiff's willingness for taking the shop on conducting basis as and when the permission is obtained from the B.M.C. He further states that hoping that the Defendants would get permission to run the flour mill, the Plaintiff voluntarily made further payment of Rs.10,000/- in March, 1974 as interest-free deposit. The same was accepted with clear understanding that if the permission is not received within reasonable time, they would sell the shops to other parties. He further states that the building was completed in August, 1974 and occupation certificate was obtained on 6.9.1974. He states that since they could not get any favourable response from the B.M.C. Authorities, they informed the Plaintiff and offered to return the amount of deposit. But the Plaintiff requested to keep the amount with them till a buyer comes for the shops.

13. The Defendants' witness further states that the Plaintiff approached him on 20.11.1975 and informed

that he had made his enquiries and was hopeful of getting permission and requested them to make an application addressed to the B.M.C. for permission to run the flour mill and give it to him so that he would pursue the matter. It is, therefore, a letter dated 20.11.1975 was given. It was addressed to the B.M.C. for getting permission in favour of Defendant No.1. Since no permission could be obtained by the Plaintiff, they presumed that permission was no forthcoming and therefore started selling the premises and accordingly sold shop premises to the Defendant No.4. In the meantime, however, the Plaintiff filed the aforesaid Criminal proceedings as also the suit.

14. There is word against word. Therefore, the evidence will have to be scrutinised on the basis of probabilities. It is hard to believe that the builder would install the flour mill in a shop premises and give it to the plaintiff on conducting basis. The building consisted of 25 shop premises besides residential premises on upper four floors. On the other hand, the Plaintiff was already having a flour mill in different area and he himself was running it. It is more probable that the Plaintiff would be interested in purchasing the shop premises himself for establishing flour mill. It is undisputed that the Plaintiff had approached the Defendants with a proposal

for this specific purpose of purchasing shop premises for establishing a flour mill. There is no evidence to show that when attempts were made by the Defendants for getting permission from the B.M.C. for establishment of flour mill prior to 1975. The Plaintiff has produced certain documents along with the affidavit of documents dated 9.10.2003. These documents consisted of pamphlet of Defendants' project of Sahyadri Apartment, Plaintiff's Bank pass book of Union Bank of India, the Defendant No.1's letter dated 20.11.1975, Plaintiff's letter dated 6.12.1975 and the B.M.C.'s letter dated 5.4.1979. It appears that the Defendants had made hue and cry with regard to the production of these documents at a belated stage and strongly objected to the exhibition of these documents. Therefore, this Court had left the exhibition of these documents to be considered at the time of decision. However, subsequently, in the cross-examination, the defendant No.3 admitted all these documents and, therefore, these documents are required to be exhibited and thus, they are admitted in evidence and exhibited as "P-2", "P-3", "P-4", "P-5" and "P-6" respectively. The conduct of defendants making hue and cry and resisting the documents, particularly their own letter dated 20.11.1975, Exhibit "P-4" and the B.M.C.'s letter dated 5.4.1979, Exhibit "P-6" given on record would speak volume. The letter dated 20.11.75, Exhibit "P-4"

is their own letter addressed to the B.M.C. which they had handed over to the Plaintiff for being forwarded to the B.M.C. for getting permission for establishment of flour mill which has been made on behalf of the Defendants, that this letter was in the Defendants' name and addressed to the B.M.C. for getting permission and therefore, it was tried to be submitted that the defendants' theory that this application came to be made for the purpose of getting flour mill was only because the plaintiff had shown his willingness to take the flour mill on conducting basis. However, I do not find any force in this submission. When there was no document made by the defendants in favour of the Plaintiffs although they accepted the amount of Rs.8,000/- from the Plaintiff, such application was bound to be in the name of the defendants and could not be in the name of the Plaintiff. The Plaintiff forwarded this letter to the B.M.C. along with his own letter, Exhibit "P-5" for getting permission from the B.M.C. to start flour mill either in shop No.10 or in shop No.21 or in shop No.22. If there was any agreement of purchase of one of these three shops for establishment of his own flour mill, the Plaintiff would not have written this letter. The Plaintiff had an experience of running flour mill and obviously was intending to expand his business and therefore wanted to purchase. The theory put forth by the Defendants

that this amount was paid by the Plaintiff as deposit hardly has any merit. The theory put forth by the Defendants is totally an after and unbelievable. What is material to be noted is the letter addressed by the B.M.C. to the Plaintiff on 5.4.1979, exhibit "P-6". By this letter, the B.M.C. authorities intimated the Plaintiff that he should produce the written agreement for purchase of the said premises. If the plaintiff did not have intention to purchase he would not have mentioned in his forwarding letter, exhibit "P-5" that he had agreed to purchase the shop premises from the Defendants. This conduct of the Plaintiff is sufficient to establish the fact that he had an agreement with the defendants to purchase the shop premises specifically for the purpose of establishment of flour mill. I, therefore, have no hesitation to hold that the Plaintiff had agreed to purchase the suit shop premises for the purpose of establishment of flour mill. It is undisputed that the Plaintiff had made payment of Rs.18,000/- and that was in full and final consideration of the shop premises as agreed. Therefore, these issues shall have to be answered in the affirmative.

Issue Nos. 8, 9 & 10 :-

15. The Plaintiff alleged that he was put in

possession of shop No.21. He has also stated so when there is no evidence in this behalf. He has not given details as to when he was put in possession. He has not led any corroborative evidence in this regard. The fact has been denied by the defendants. If the plaintiff had received the possession of the shop No.21 i.e. the suit premises, there would have been at least some documents like possession receipt or a letter about handing over possession. However, no such document is produced. Therefore, the plaintiff has failed to prove that he was put in possession of shop No.21. Since the Plaintiff failed to prove that he was put in possession, there is no question of dispossession and therefore, these issues will have to be answered in the negative.

Issue No. 12 :-

16. The Defendant No.4 as also the Defendant No.3 state that Defendant No.4 had purchased the suit premises bonafide for value without notice of the Plaintiff's agreement with the defendants. However, Defendant no.4 appears to be put forth by the Defendant Nos. 1 to 3 for the purpose of defeating the Plaintiff's claim. The original alleged agreement with the Defendant No.4 has not been produced. It is stated that the said agreement has been lodged with the

Sub-Registrar. However, no receipt obtained from the Sub-Registrar is produced. The Defendant No.4 states that he had lost that agreement. He states that he was put in possession of the suit premises in 1978 and the agreement was prior thereto. However, in the Written Statement filed by the Defendant No.4, there is no mention of any agreement having been entered into and lodged for registration. In the Written Statement also there is no mention as to for what consideration the suit shop was sold by the Defendants Nos. 1 to 3 to Defendant No.4. There is also no mention of what was the date, month or year of purchase. The Defendant no.3 has admitted in his evidence that the occupants of Sahyadri Apartments have formed a Co-operative Society and it has been registered somewhere in 1988 or 1989. He further admits that before registration of the Society, an Adhoc Managing Committee was appointed for looking after the interest of the purchasers. At that time, a list of purchasers of the flats and shops was handed over to the said Committee. He further admits that in the list, shop premises Nos.10,21 and 22 were shown to be unsold. This indicates that when the Society was registered in 1988-89, these three shops were shown to be unsold. These circumstances therefore clearly show that the Defendants Nos. 1 to 3 had not sold the suit shop to the Defendant No.4 when the suit was filed and it appears that subsequently some

agreement was made between them. Therefore, the Defendant No.4 has failed to prove that he is a bonafide purchaser of the suit shop for value. It appears that the Defendants Nos. 1 to 3 have put forth the Defendant No.4 for protecting the shop premises. This issue therefore has to be answered in the negative.

Issue Nos. 4, 7, 11 & 13 :-

17. The Plaintiff's claim for specific performance of the oral agreement of purchase of suit shop from the defendants and consequently, also claimed possession thereof. Needless to say that specific performance of the agreement of sale of the immovable property is a discretionary relief. Such discretion shall have to be exercised judiciously. In the present case, it is undisputed that the plaintiff had intended to purchase the suit shop premises with the specific purpose of establishing a flour mill. It is clear from the evidence that till the filing of the suit in 1979-80, although the plaintiff had made frantic attempts, he could not get permission from the B.M.C. for the purpose of establishing of flour mill. This may be due to the fact that the Defendants did not make written agreement in favour of the Plaintiff. However, when today he is claiming specific performance of the said

agreement, the plaintiff should have led evidence to indicate that even today such permission could be obtained by him in that area. In that regard, he should have examined some witness from B.M.C. Authorities that even today such permission can be given for establishment of the flour mill in the said building. Needless to say that the flour mill permission is granted on certain conditions and on verification of certain facts i.e. with regard to the requirement of flour mill in that area. Therefore, there is no evidence to show that there is probability of granting of such permission in favour of the plaintiff in respect of the suit shop. Since after the suit agreement more than 25 years have elapsed and it is not clear as to what is the present situation with regard to the granting of permission for establishment of flour mill in the suit shop.

18. The learned Counsel for the Plaintiff however submitted that he could get alternative relief of refund of money with interest. That obviously could be granted in favour of the Plaintiff as it is an admitted position that the Defendants have received the amount of Rs.18,000/- from the Plaintiff. Under these circumstances, I answer issue Nos. 4 and 7 in the negative. The Plaintiff is not entitled to the relief of specific performance of the said oral agreement of

purchase of the suit shop.

19. The plaintiff has claimed damages of Rs.25,000/-. However, the Plaintiff has not led any evidence in that behalf. It is not clear therefore as to how he suffered the damages of Rs.25,000/- on account of breach of contract committed by the Defendants Nos. 1 to 3. This issue shall have to be answered in the negative.

20. By their own conduct, the Defendants have committed breach of the contract and, therefore, the Plaintiff would be entitled to refund of money paid by him to the Defendants with interest. The Plaintiff has claimed refund of Rs.8,000/- with interest at 12% per annum from 20.11.1973 till the date of the suit i.e. 4.9.1979. The Plaintiff has claimed refund of Rs.10,000/- with interest at 12% per annum from 20.3.1974 till the date of the suit i.e. 4.7.1979. The plaintiff would be entitled to this amount of interest on Rs.8,000/- which comes to Rs.5,562.36 ps. and the amount of interest on Rs.10,000/- for the aforesaid period comes to Rs.6,556.41 ps. as indicated in Exhibit "B" annexed to the plaint. The total amount of Rs.18,000/- + interest as stated above comes to Rs.30,118.77 ps. The Plaintiff would be entitled to this amount.

21. Hence, the following order :-

(i) The suit is partly decreed.

(ii) The Plaintiff's suit for specific performance of the oral agreement of sale of suit shop is hereby dismissed.

(iii) The plaintiff's claim for damages of Rs.25,000/- is dismissed.

(iv) The Plaintiff's suit for refund of Rs.18,000/- with interest is decreed. The Defendants Nos. 1 to 3 shall pay to the Plaintiff Rs.30,118.77 i.e. Rs.18,000/- with interest as stated above till the filing of the suit. The Defendants Nos. 1 to 3 shall also pay to the Plaintiff interest at 12% per annum on Rs.18,000/- from the date of the suit till realisation of the entire amount.

(v) The Defendants Nos. 1 to 3 shall also pay the Plaintiff's costs and bear their own.

(vi) The Defendant No.4 shall bear his own costs.

(S.K.SHAH, J.)